

H.E. NO. 90-55

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LIVINGSTON BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-89-49
& CO-H-89-271

LIVINGSTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Sections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when, following the issuance of a prior Commission decision involving the same parties (P.E.R.C. No. 89-90, 15 NJPER 159 [¶20067 1989]), which ordered the Respondent, inter alia, to restore the status quo ante as to Elliot Lovi's position of Cooperative Education Summer Coordinator to a 12-month status, which necessarily included the restoration of the number of sick days to which Lovi was entitled [14 days instead of 12 days], the Respondent failed to do so. The Commission had also directed the Board to negotiate with the Association over any change in Lovi's terms and conditions of employment.

The effort which the Respondent made to negotiate after the issuance of the Commission's Order on February 14, 1989, was found to be legally deficient, i.e., there was no "meeting of the minds" on any proposed changes in Lovi's terms and conditions of employment by the Respondent. In this connection, the Association's negotiator, who met on one occasion with the Respondent's negotiator, was found to have lacked authority to bind the Association to any proposed change in Lovi's terms and conditions of employment by the Board. Finally, the Respondent violated the Act when it unilaterally reduced the number of paychecks that Lovi received per month for summer work from two paychecks per month to one paycheck per month without having negotiated this change with the Association prior to implementation.

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By way of remedy, the Hearing Examiner again ordered the restoration of the status quo ante as to Elliot Lovi's terms and conditions of employment, including his position, the number of sick days that he receives and the number of paychecks that he receives for summer work. The recommended order made clear that no changes can be made in Lovi's terms and conditions of employment without with an agreement by the Association so to do.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For the Respondent

Riker, Danzig, Scherer, Hyland & Perretti, Attorneys
(James S. Rothchild, Jr., of counsel)

For the Charging Party

Balk, Oxfeld, Mandell & Cohen, Attorneys
(Nancy I. Oxfeld, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") in Docket No. CO-H-89-49 on August 11, 1988, and was twice amended thereafter, first on October 19, 1988 and again on October 4, 1989, by the Livingston Education Association ("Charging Party" or "Association") alleging that the Livingston Board of Education ("Respondent" or "Board") has engaged in unfair practices within the meaning of the Act New Jersey Employer-Employee Relations Act, as amended N.J.S.A. 34:13A-1 et seq. ("Act"). A second Unfair Practice Charge was filed with the Commission by the Association in Docket No. CO-H-89-271 on

March 21, 1989, which also alleged that the Board has engaged in unfair practices within the meaning of the Act.

In the original Unfair Practice Charge, as amended, the Association alleged that Elliott Lovi has been employed by the Board as a Coordinator of Cooperative Marketing Education since 1969 and that as a unit member his salary was set forth in the collective negotiations agreement between the parties; that Lovi has been employed each summer since 1969 through 1987 and has received his salary in semi-monthly paychecks; that in July 1988 Lovi was not paid by semi-monthly checks but rather by one paycheck per month; that ten-month employees under the agreement receive twelve paid sick days per year and that Lovi has always received an additional two sick days per year for a total of 14 sick days, the additional two days being for the work that Lovi has performed during the summers; that on September 15, 1988, Lovi received a memorandum from the Assistant Superintendent, advising him that the Board was allowing him only twelve sick days per year; that for the summers of 1988 and 1989 the Board denied Lovi the two additional sick days; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.^{1/}

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

In the second Unfair Practice Charge, docketed March 21, 1989, supra, the Association alleged additionally that on February 2, 1989, the Board posted as a separate summer position Lovi's position of Cooperative Educational Summer Coordinator;^{2/} and that on February 14, 1989, the Commission issued a decision involving the instant parties [Docket No. CO-H-88-247], which required the Board to employ Lovi on a 12-month basis and to negotiate with the Association over any change in Lovi's terms and conditions of employment; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.^{3/}]

It appearing that the allegations in the several Unfair Practice Charges, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 17, 1988 in Docket No. CO-H-89-49 and, further, a Complaint and Notice of Hearing was issued on July 7, 1989 in Docket No. CO-H-89-271. Thereafter, both cases were consolidated on August 31, 1989. Pursuant to the consolidated Complaints and Notices of Hearing, a hearing was held after several mutual adjournments on March 27, 1990, in Newark, New Jersey, at which time the parties were given an opportunity to examine

^{2/} Apparently, the actual job title for Lovi, which appears in the original Unfair Practice Charge as "Coordinator of Cooperative Marketing Education," is more accurately denominated as "Cooperative Education Summer Coordinator" since there is nothing in the record made at the hearing which indicates otherwise (see J-2, p. 47).

^{3/} These subsections have previously been set forth.

witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs on May 1, 1990.

Two Unfair Practice Charges, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Livingston Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Livingston Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The most recent collective negotiations agreements between the parties have spanned two successive two-year terms from July 1, 1987 through June 30, 1989 [J-1] and from July 1, 1989 through June 30, 1991 [J-2].

4. Elliott Lovi has performed the same essential duties for the Board since 1969 in varying job titles.^{4/} For example, Schedule "D" of "Extra Compensation Payments" in the July 1, 1978 through June 30, 1979 agreement, describes his job title as Distributive Education Department Head (CP-1; Tr 8). However, in the 1987-89 and 1989-91 agreements (J-1 & J-2, supra), Lovi's job title is referred to in Schedule "C" as Cooperative Education Summer Coordinator.

5. Under all of the collective negotiations agreements since 1978, Lovi has received one-tenth of his salary for summer work (CP-1, J-1 & J-2, supra; Tr 9).

6. From 1969 through the summer of 1987, Lovi received two more sick days than the ten-month employees. In recent years this has resulted in Lovi receiving 14 sick days. Then, commencing in the summer of 1988, the Board reduced Lovi's sick days by two days per year so that they were then the same as the sick days of ten-month employees. [Tr 9, 10, 15].

7. From the summer of 1969 to the summer of 1987, Lovi received two paychecks per month for summer work. Commencing in the summer of 1988, the Board paid Lovi one paycheck per month for his summer work. [Tr 10].

^{4/} Lovi's job duties have involved the coordinating of co-op students in their classroom studies and with their employers in job placements (Tr 14).

8. In the summer of 1989, the Board posted the position of Cooperative Education Summer Coordinator and Lovi applied for this position. He was appointed to the position and received one-tenth of his ten-month salary. [Tr 10, 11, 16, 17]. However, the appointment of Lovi for the summer of 1989 was made on the same basis as was his appointment for the summer of 1988 (see Finding of Fact No. 23b-d, infra, at pp. 13-15).

9. For the summer of 1990, the Board has posted the same position of Cooperative Education Summer Coordinator as it had posted in 1989 and Lovi has again applied for the position but no one had been appointed as of the date of the hearing on March 27, 1990.^{5/} [Tr 11].

10. Robert C. Gray, the immediate past President of the Association [September 1, 1987 through July 30, 1989] served in an ex officio capacity in the negotiations, which resulted in the 1989-91 agreement (J-2, supra). [Tr 39, 40]. The Chief Negotiator for the Association was June Graf, who has acted in this capacity during the negotiations of the four prior agreements. [Tr 40, 41, 67, 68]. Gray testified unequivocally that Graf never had the authority to reach an agreement "on her own" (Tr 41). Gray acknowledged on cross-examination that he had never told the Board's negotiator, Robert S. Kish, its Superintendent, that Graf had no authority to "make any agreement" (Tr 45). Graf's testimony was

^{5/} The parties stipulated that as of the date of the hearing Lovi was not seeking back pay (Tr 11).

that she had no authority to enter into any agreement "...Not unless the team specifically had made those agreements with me and sent me on that kind of a mission..." (Tr 69).

11. Negotiations for the current agreement (J-2) commenced in October 1988 and were concluded in either late February or early March 1989 (Tr 42).^{6/} Both Gray and Graf testified without contradiction that during the negotiations for J-2 there was never any discussion of Lovi or his work as a Cooperative Education Summer Coordinator (Tr 42, 69). Gray alone testified that there was never any discussion in the negotiations for J-2 regarding the number of paychecks received by Lovi during his summer work or any change in the number of sick days that he was to receive (Tr 42-44). Further, Gray testified without contradiction that the Board and the Association never reached any agreement to change the work year of Lovi or the position of Cooperative Education Summer Coordinator (Tr 43).

12. Schedule "C" of the 1987-89 agreement (J-1, pp. 39, 40) and the 1989-91 agreement (J-2, pp. 47, 48) sets forth by job title the co-curricular or extra-curricular annual stipends for various activities, including the Cooperative Education Summer Coordinator position of Lovi. In the Schedule "C" provision of each of the agreements (J-1 & J-2) all of the job titles carry a stipend in a specific amount of dollars per year except that of Lovi's

^{6/} Graf testified that the agreement was signed in March (Tr 83).

position of Cooperative Education Summer Coordinator, which is set forth in each agreement as one-tenth of salary [".1 salary"]. On cross-examination, Gray acknowledged that the stipends were in specific dollar amounts, connoting "extra pay" in addition to one's regular salary but insisted that Lovi was a "twelve-month employee" whose salary was determined by the "contract stipulation as to the amount of salary..." [Tr 49, 50].

13. Gray also testified on cross-examination that the increases in the stipends on Schedule "C" are negotiated as a percentage, which is then allocated across the spread of job titles (Tr 55, 58-63). Thus, after the specific percentage increase in dollars is agreed upon between the parties for distribution across Schedule "C," the Association's negotiators meet initially and they then suggest to the Board what the specific dollar allocation should be by job title (Tr 62-64). However, the Board must agree with the allocation before the Schedule "C" negotiations are concluded (Tr 62-65).

14. Graf added that the past procedure for allocating monies to the various job titles within the Schedules has been for the Association's negotiators to obtain input from the employees in each job title and then determine the dollar increases, following which Graf and Superintendent Kish review the result (Tr 71, 72, 77, 78). Finally, Kish testified that after each party provided input as to how the allocations were to be made across the various job titles in the Schedules, the past practice had been for him to meet

with Graf and that the agreement that they reached was then taken back to their respective committees with the mutual expectation of approval (Tr 86-89).

15. A prior Commission decision involving the instant parties [H.E. No. 89-17, 15 NJPER 31 (¶20014 1988) and P.E.R.C. No. 89-90, 15 NJPER 159 (¶20067 1989)], was received by the Board on or about February 14, 1989^{7/}. [Tr 90]. Several days later, Kish met with Graf. After first discussing another matter, he mentioned the "...directive from PERC to renegotiate Mr. Lovi's terms and conditions of employment..." (Tr 91). Kish stated to Graf that it was the Board's position that Lovi should be a ten-month employee with a one-month stipend (Tr 91). According to Kish, Graf replied that she really was not familiar with the Lovi matter. She acknowledged that there had been a problem regarding Lovi "...but she wasn't sure what it was..." [Tr 91, 92].

16. Graf's testimony was vague and confusing as to what transpired at her meeting with Kish. Although she did acknowledge that the subject of Lovi was discussed, she stated at one point that she thought that the Commission's decision had settled the matter. [Tr 78-83]. On cross-examination, Graf recalled that the subject of

^{7/} The Commission ordered, inter alia, that the Board take the following affirmative action: (1) restore the status quo ante by restoring Lovi's position to a 12-month status and (2) negotiate with the Association over any change in Lovi's terms and conditions of employment.

Lovi's vacation had been raised by Kish at their meeting (Tr 81, 82).^{8/}

17. At the conclusion of their meeting, Kish said that he would follow up the discussion with a letter "...stipulating that the negotiations as directed in the letter from PERC had in fact occurred and that these were the agreements as listed in the contract and that the position would be considered a ten month position as were all other positions on Schedule C..." (Tr 92).^{9/}

18. Kish's promised letter, dated March 1, 1989, was addressed to Graf and stated in its entirety:

We recently received the PERC decision requiring us to negotiate concerning Elliot Lovi's terms and conditions of employment. Of course, since we have now done those negotiations (see annexed) we are in compliance with the recommendation of the Commission. Thank you for your cooperation in this matter.
[J-3].

Kish also testified that he wrote his follow-up letter "...so that if the Association committee...had a problem with that change...they would respond to the letter and we would deal with it..." (Tr 93). Continuing, Kish said, "...I wanted to make sure that the entire committee was aware that this discussion had taken place and that this was the intent of the Board in the negotiations process and

^{8/} At the hearing Kish volunteered that it was his belief that "...on a personal level..." Graf "...probably agreed..." that all teaching positions were ten-month positions [Tr 92-94, 102, 105]. [Emphasis supplied].

^{9/} Kish's subsequent letter of March 1, 1989 (J-3, infra) contained no such statement (Tr 99).

that there would be some agreement that the negotiations had in fact been done and were agreed to and that we had then complied with the directive from PERC..." (Tr 95).^{10/}

19. Attached to Kish's March 1st letter, supra, was page 39 of Schedule "C" from the 1987-89 agreement (J-1) with a "circle" around Lovi's position of "*Cooperative Educational Summer Coordinator." Additionally, an unexplained phrase, "Mr. Lovi's position," had been added within the "circle" around the phrase "*additional coordinator if numbers warrant."^{11/} [Tr 98-101]. Kish was asked to explain the meaning of the "circles" around "*Cooperative Educational Summer Coordinator" and the phrase "*additional coordinator if numbers warrant Mr. Lovi's position" (Tr 98). Kish replied that it was "...to point out where in the negotiations process Mr. Lovi's position had in fact been included in the negotiations..." since "...there was no language in the prior contract that identified Mr. Lovi was a twelve month employee....[T]he intent of the negotiations was to clarify his position..." (Tr 98). The Hearing Examiner finds as a fact that Kish failed to provide any explanation whatsoever for the "circling" and the unexplained addition to his attachment to the March 1st letter (see Tr 98-101).

^{10/} Kish testified without contradiction that he never received any response from Graf or the Association, following his March 1st letter to Graf (Tr 95).

^{11/} The phrase "Mr. Lovi's position" does not appear in the original of J-1, p. 39.

20. On cross-examination Kish acknowledged that there was nothing in his discussion with Graf or in his letter of March 1st, which indicated that it was the Board's position that there was an agreement that Lovi's work year was being changed from twelve to ten months (Tr 105, 106). Kish added that he had felt no need to put this in writing since he and Graf often "...came to agreements and they weren't necessarily always reduced to writing..." (Tr 106). Often these agreements became a "...matter of interpretation..." as to meaning (Tr 106). The Hearing Examiner finds incredible Kish's subsequent testimony that even though "...we left the same language..." there was an "...understanding with...Graf that the same language meant something different in the new contract..." [Tr 106, 107]. [Emphasis supplied]. Kish based this testimony upon an apparent inability to have expressed this in a contract, adding that "...It could have been some kind of side bar agreement, I suppose..." (Tr 107).

21. Lovi has had the same vacation schedule since 1984 (Tr 108). The Board has never indicated to the Association nor have the parties agreed that Lovi should have a different vacation schedule from the one that he presently has (Tr 109, 110). Also, Kish acknowledged that the issue of Lovi's sick days had never been discussed in negotiations (Tr 112).

22. At some point, when no response had been received from the Association, Kish advised the Board that the negotiations had been concluded and that Lovi's position had been discussed and that

it would be included with the other ten-month coordinator positions in the new contract (Tr 103).

23. The Hearing Examiner takes administrative notice of the following facts found by Hearing Examiner Marc Stewart in the proceeding previously referred to in Finding of Fact No. 15, supra:^{12/}

a. Since Lovi's initial employment by the Board in 1969-70, his terms and conditions of employment have historically conformed to those of the standard 12-month employees in certain but not all respects, i.e., while his vacation benefits did not conform, his sick benefits did. Lovi has always held a separate stipend position unrelated to his regular employment unlike that of other teachers with stipend positions whose contract designations made their stipends separate and apart from their regular positions. These latter contracts reflected regular 10-month employment with separate summer employment unlike Lovi who had always been offered and had accepted a summer position before the Board formally offered him his employment contract. This enabled the Board to include the summer stipend position as a part of his regular employment and to combine them into one employment contract and salary for the entire school year. [See Stewart's F/F ¶3].

^{12/} The facts found in the prior proceeding complement the facts found herein. Further, the facts found by Hearing Examiner Stewart are conclusive in this proceeding since the Commission adopted them as "accurate" and incorporated them into its decision (see 15 NJPER at 160).

b. On November 3, 1987, the Board notified Lovi that it had come to its attention that he had been "incorrectly paid on a twelve-month basis over the last several years" and that as of the 1988-89 school year he would be paid on a 10-month contractual basis. Lovi would continue to be paid for summer work on a "pro-rated" basis against annual salary. The Board stated that the reason for the change was that "summer work" had to be approved annually and that it was not a fixed condition of Lovi's "assignment." The Board added that additional considerations were the district's financial condition and the number of students enrolled in the summer program. The Board responded to the Association's subsequent objection on December 10, 1987, indicating that it was merely making clear its reservation of the right to eliminate the summer segment of Lovi's program based on lack of enrollment or budget considerations. [See Stewart's F/F ¶4].

c. On March 8, 1988, the Board posted a list of positions open for the summer of 1988, including Lovi's position of Cooperative Education Summer Coordinator. Lovi submitted a timely application on March 10th for this position with the admonition that it not be construed as prejudicing his claim that he has historically been hired as a certified 12-month employee and was entitled to be paid for this position under the agreement. The Board notified Lovi on March 28, 1988, that it intended to approve his appointment as Cooperative Education Summer Coordinator on

April 4th for the summer of 1988 at a stipend of ".1% of his yearly salary."^{13/} [See Stewart's F/F ¶4].

d. From the date of Lovi's appointment to his initial position on July 3, 1969, various documents such as employment contracts, Memorandum to Personnel on Tenure, Board minutes, etc., have described Lovi's positions by job title as being either 11-month or 12-month. This status continued through the 1987-88 school year. It was only in a memorandum of April 27, 1988, that the Board first approved Lovi's 1988-89 salary without any "month" designation whatever. [See Stewart's F/F ¶6].

e. On June 10, 1971, the Board advised Lovi that his 12-month contract for 1971-72 entitled him to one sick day per month for a total of twelve sick days for that year and that he was also entitled to three one-week vacations during the school year and a one-month vacation in the summer. [See Stewart's F/F ¶6].

ANALYSIS

After reviewing the Commission's prior decision, issued on February 14, 1989 [P.E.R.C. No. 89-90, 15 NJPER 159 (¶20067 1989)], it is immediately apparent that what remains to be resolved in this proceeding is whether or not the Board, pursuant to the Commission's

^{13/} In F/F ¶5 Hearing Examiner Stewart found that the collective negotiations agreements from 1980 through 1989 described Lovi's title as either Department Head Distributive Education or Coordinator of Cooperative Education/Summer Coordinator carrying, in either event, additional compensation of ".1 salary."

Order, restored the status quo ante by restoring Lovi to his prior 12-month position and thereafter negotiated with the Association over any change in his terms and conditions of employment.

Unfortunately for the Board, the above Findings of Fact indicate that the Board has not obtained from the Association in negotiations an agreed-upon change in the status of Lovi's position from that of a 12-month to a 10-month position as the Board has sought.

It will be recalled that Findings of Fact Nos. 6 and 7, supra, state that the Board's unilateral reduction in the number of Lovi's sick days from 14 days to 12 days occurred in the summer of 1988 as did the Board's unilateral reduction in the number of paychecks per month tendered to Lovi for summer work from two paychecks per month to one paycheck per month.^{14/} Since Hearing Examiner Stewart conducted his hearing in the prior case on June 2, 1988, which necessarily preceded the "summer of 1988," his Findings of Fact and the Commission's adoption thereof could not have taken into consideration these two unilateral changes. Thus, the instant record tracks the events subsequent to the summer of 1988.

^{14/} It appears that the Board has not altered Lovi's vacation schedule. Finding of Fact No. 21, supra, states that his vacation schedule has remained the same since 1984, and that the Board has never indicated to the Association nor have the parties agreed that a different vacation schedule should obtain.

The Respondent Board Has Again Violated Sections 5.4(a)(1) And (5) Of The Act By Having Persisted In Its Unilateral Change In The Position Of Elliot Lovi From One Of Twelve Months To Ten Months Without Having First Obtained The Association's Agreement So To Do Through Collective Negotiations.

During the pendency of the prior proceeding, collective negotiations for the current 1989-91 agreement (J-2) had commenced in October 1988 and were concluded in either late February or early March 1989. It is undisputed that during these negotiations there was never any discussion of Lovi or of his position. Nor was any agreement ever reached between the parties to alter Lovi's work year. Gray testified without contradiction that there was never any discussion with respect to any change in the number of sick days that Lovi was to receive nor the number of paychecks that he was to receive during his summer employment. [See Finding of Fact No 11, supra].

Kish testified without contradiction that several days after the Board received the Commission's decision of February 14, 1989, he met with Graf and stated to her that it was the Board's position that Lovi should be a 10-month employee with a one-month stipend (see Finding of Fact No. 15, supra). The Hearing Examiner has no doubt but that Graf's response, however construed, was not in fact an assent to Kish's statement that Lovi should be a 10-month employee. Graf stated, inter alia, that she knew that there had been a problem with Lovi "...but she wasn't sure what it was...", adding at one point that she thought that the Commission's decision had settled the matter. [See Findings of Fact Nos. 15 & 16,

supra]. Recall that Kish volunteered in his testimony, disputing that of Graf, that it was his belief that she had "probably agreed" that all teaching positions were 10-month positions but acknowledged that this was "...on a personal level..." [see Finding of Fact No. 16, supra, and, particularly, Tr 92-94, 102, 105].

At the conclusion of their meeting, Kish stated that he would follow up his discussion with Graf with a letter, which would stipulate that "...the negotiations as directed in the letter from PERC had in fact occurred and that these were the agreements..." (presumably reached that day with Graf). Aside from what Kish may have stated to Graf at the conclusion of their meeting, his subsequent letter of March 1, 1989, failed to reflect what he testified he had said to her. [See Findings of Fact Nos. 17 & 18, supra].

At the hearing Kish gave several explanations as to why he wrote his letter of March 1st to Graf. First, he insisted that he wanted to be certain that the committee was aware of his discussion with Graf and that the negotiations as directed by PERC "...had in fact been done and were agreed to..." adding that if the Association had a problem with the change it would respond to the letter and "...we would deal with it..." [See Finding of Fact No. 18, supra]. However, Kish's letter of March 1st defies explanation as to what exactly he intended to convey to Graf and the Association. For example, in the second of the three sentences constituting the letter, he states that "...since we have now done those negotiations (see annexed) we are in compliance with the

recommendation of the Commission..." (emphasis supplied). Plainly, this sentence does nothing but state the issue before the Hearing Examiner in this case, *i.e.*, did the Board negotiate a change in the status quo with the Association as it was ordered to do?

What Kish "annexed" to his letter was page 39 of Schedule "C" from the 1987-89 agreement with several unexplained "circles" and an unexplained addition. The Hearing Examiner has found as a fact that Kish failed to provide any explanation whatsoever for the "circling" and the unexplained addition. [See Findings of Fact Nos. 18 & 19, supra]. Thus, Kish's attachment of page 39 of Schedule "C" from the 1987-89 agreement makes no sense since it is unrelated to the body of the second sentence of his letter of March 1st.^{15/}

Finally, Kish acknowledged on cross-examination that there was nothing in his discussion with Graf or in his letter of March 1st, which indicated that it was the Board's position that there was an agreement that Lovi's work year was being changed from 12 months to 10 months (see Finding of Fact No. 20, supra, and Tr 105-106). Kish then added that he felt no need to put this agreement with respect to Lovi in writing since he and Graf often "...came to agreements and they weren't necessarily always reduced to writing..." explaining that past agreements became a "...matter of interpretation..." as to meaning. The Hearing Examiner has found incredible the subsequent testimony of Kish that even though "...we

^{15/} The fact that neither Graf nor the Association responded to Kish's letter is irrelevant to the ultimate decision in this case (see Finding of Fact No. 18, supra).

left the same language..." there was an "...understanding with...Graf that the same language meant something different in the new contract..." (emphasis supplied). [See Finding of Fact No. 20, supra]. Query: How could the "same language" logically give rise to an "understanding" with Graf that it "meant something different..."?

If there ever was a case where there was no "meeting of the minds" in collective negotiations, it is presented in this case.^{16/} First, the above recital of the testimonial and documentary evidence establishes beyond doubt that actual negotiations never took place between the Board and the Association through their representatives, Kish and Graf, respectively. Further, even if the Hearing Examiner was to assume that actual negotiations between Kish and Graf occurred at their meeting, which preceded Kish's letter of March 1, 1989, Graf totally lacked authority to bind the Association. The Hearing Examiner credits Gray's testimony that Graf never had authority to reach an agreement "on her own." Graf's testimony was that unless she had been given prior authorization by her committee and was "...sent...on that kind

^{16/} See, for example, Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 78-25, 3 NJPER 382 (1977); Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983); and Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15120 1983). The latter two of these cases were last cited by the Commission in Ocean Cty. Sheriff, P.E.R.C. No. 86-107, 12 NJPER 341, 347 (¶17130 1986). In each case it was found that there had been no "meeting of the minds".

of mission..." she could not enter into any binding agreement. [see Finding of Fact No. 10, supra].^{17/}

Both Gray and Graf testified extensively without contradiction as to the methods employed by the parties in reaching agreement on the allocation of monies negotiated for the various positions on the several schedules attached to the collective agreements, including Schedule "C." After the Association's negotiators meet initially they then make suggestions to the Board on allocations over the job titles within the schedules. The Board must agree with the allocation before the negotiations are concluded. Even Kish testified that the past practice had been for him to meet with Graf on such matters and that the agreement or agreements that they reached were taken back to the respective committees with the mutual expectation of approval. [See Findings of Fact No. 12-14, supra]. From this the Hearing Examiner has no doubt but that Graf would have to have taken any "agreement" reached with Kish regarding a change in Lovi's employment status back to her committee for approval before implementation.

Based upon the above analysis,^{18/} the Hearing Examiner

^{17/} Compare Boro of Matawan, P.E.R.C. No. 86-87, 12 NJPER 135 (¶17052 1986) and Boro of Wood-Ridge, P.E.R.C. No. 81-105, 7 NJPER 149, 150 (¶12066 1981) with East Brunswick Bd. of Ed., 2 NJPER 279, 281, 282 (1976) and Long Branch Bd. of Ed., P.E.R.C. No. 77-70, 3 NJPER 300, 301 (1977).

^{18/} The Hearing Examiner's conclusions herein are also based upon the Commission's prior rationale and the cases cited and discussed by it at 15 NJPER 160.

finds and concludes that the Respondent Board has again violated Sections 5.4(a)(1) and (5) of the Act by its failure to have restored the status quo ante as to Elliot Lovi by restoring his position to a 12-month status, following the issuance of the Commission's Order of February 14, 1989. Thus, the Hearing Examiner will recommend anew what the Commission has previously ordered, namely: (1) that the Board forthwith take the affirmative action of restoring the status quo ante as to Elliot Lovi by restoring his position of Cooperative Education Summer Coordinator to 12-month status from the current 10-month status; and (2) that the Board negotiate with the Association over any change in the terms and conditions of Lovi's employment prior to implementation.

The Respondent Board Violated Section 5.4(a)(1) And (5) Of The Act When It Unilaterally Reduced The Number Of Elliot Lovi's Sick Days From 14 Days To 12 Days As Of The Summer Of 1988 And At The Same Time Unilaterally Reduced The Number Of Paychecks That Lovi Received Per Month For Summer Work From Two Paychecks Per Month To One Paycheck Per Month Without Having First Obtained The Association's Agreement So To Do Through Collective Negotiations.

It might be contended that the sick day and paycheck issues were subsumed within the Commission's Order of February 14, 1989, supra, and, thus, were necessarily included in the directive to restore the status quo ante as to Lovi by restoring his position to a 12-month status. However, since the unilateral action of the Board in reducing Lovi's sick days from 14 days to 12 days in the summer of 1988 was litigated in the case at bar, the Hearing Examiner will decide this issue separately in this proceeding.

Since the subject of sick days is mandatorily negotiable it cannot be altered unilaterally: see Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986) and Hoboken Bd. of Ed., P.E.R.C. No. 81-97, 7 NJPER 135, 136 (¶12058 1981).

The same conclusion is reached as to the unilateral action of the Board when it reduced the number of paychecks per month tendered to Lovi from two per month to one per month in the summer of 1988. The Commission in City of Burlington, P.E.R.C. No. 89-132, 15 NJPER 415 (¶20170 1989) restated the law with respect to the timing of the issuance of paychecks. There the Commission held once again that this subject is mandatorily negotiable: see Bor. of River Edge, P.E.R.C. No. 89-44, 14 NJPER 684 (¶19289 1988); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); Lawrence Tp. Bd. of Ed., P.E.R.C. No. 81-69, 7 NJPER 13 (¶12005 1980); City of Paterson, P.E.R.C. No. 80-68, 5 NJPER 543 (¶10280 1979), aff'd App. Div. Dkt. No. A-1318-79 (2/10/81); Garfield Bd. of Ed., P.E.R.C. No. 80-67, 5 NJPER 542 (¶10279 1979); College of Medicine & Dentistry, P.E.R.C. No. 77-35, 3 NJPER 70 (1977).

Thus, Sections 5.4(a)(1) and (5) of the Act were violated by the Board as to Lovi on and after the summer of 1988 when it unilaterally reduced the number of his sick days by two per year and at the same time commenced making payment to him once per month instead of the prior longstanding practice of two paychecks per month. An appropriate remedy will be recommended hereinafter.

* * * *

Based upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(a) and (5) when, following the Commission's Order in P.E.R.C. No. 89-90, 15 NJPER 159 (¶20067 1989), it failed to restore the status quo ante as to Elliot Lovi with respect to the 12-month status of his position.

2. The Respondent Board further violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally reduced the number of Elliot Lovi's sick days from 14 per year to 12 per year and also changed the number of paychecks tendered to Elliot Lovi per month for summer work by reducing the number from two paychecks per month to one paycheck per month without having first negotiated this change with the Association prior to implementation.

3. The Respondent Board also violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it failed to obtain the Association's agreement as to any change in the terms and conditions of employment of Elliot Lovi in collective negotiations prior to implementation.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly (a) by failing and refusing to restore the status quo ante as to Elliot Lovi's position of Cooperative Education

Summer Coordinator to a 12-month status and to negotiate any future change in Lovi's terms and conditions of employment with the Association prior to implementation and (b) by unilaterally changing the number of sick days and the frequency of the receipt of paychecks by Elliot Lovi without first negotiating such changes with the Association prior to implementation.

2. Refusing to negotiate in good faith with representatives of the Association with respect to the terms and conditions of employment of Elliot Lovi, including the status of his position as Cooperative Education Summer Coordinator, the number of sick days per year received by Lovi and the number of paychecks received by Lovi per month for summer work without having first negotiated any proposed change with the Association prior to implementation.

B. That the Respondent Board take the following affirmative action:

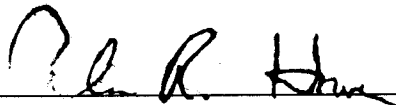
1. Forthwith restore the status quo ante as to Elliot Lovi by restoring his position of Cooperative Education Summer Coordinator to a 12-month status, including the restoration of the number of Lovi's sick days from 12 days per year to 14 days per year and the restoration of the number of paychecks received by Lovi for summer work from one paycheck per month to two paychecks per month.^{19/}

^{19/} The parties stipulated that Lovi was not seeking any back pay in this proceeding (see Finding of Fact No. 9, supra).

2. Negotiate with the Association over any future proposed changes in the terms and conditions of employment of Elliot Lovi's position as Cooperative Education Summer Coordinator prior to implementation.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.



Alan R. Howe
Hearing Examiner

Dated: June 29, 1990
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly (a) by failing and refusing to restore the status quo ante as to Elliot Lovi's position of Cooperative Education Summer Coordinator to a 12-month status and to negotiate any future change in Lovi's terms and conditions of employment with the Association prior to implementation and (b) by unilaterally changing the number of sick days and the frequency of the receipt of paychecks by Elliot Lovi without first negotiating such changes with the Association prior to implementation.

WE WILL NOT refuse to negotiate in good faith with representatives of the Association with respect to the terms and conditions of employment of Elliot Lovi, including the status of his position as Cooperative Education Summer Coordinator, the number of sick days per year received by Lovi and the number of paychecks received by Lovi per month for summer work without having first negotiated any proposed change with the Association prior to implementation.

WE WILL forthwith restore the status quo ante as to Elliot Lovi by restoring his position of Cooperative Education Summer Coordinator to a 12-month status, including the restoration of the number of Lovi's sick days from 12 days per year to 14 days per year and the restoration of the number of paychecks received by Lovi for summer work from one paycheck per month to two paychecks per month.

WE WILL negotiate with the Association over any future proposed changes in the terms and conditions of employment of Elliot Lovi's position as Cooperative Education Summer Coordinator prior to implementation.

Docket Nos. CO-H-89-49; CO-H-89-271 LIVINGSTON BOARD OF EDUCATION

(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.